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*Explaining the Value of Transactional Lawyering*¹

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Abstract: This article attempts, empirically, to explain the value that lawyers add when acting as counsel to parties in business transactions. Contrary to existing scholarship, which is based mostly on theory, this article shows that transactional lawyers add value primarily by reducing regulatory costs, thereby challenging the reigning models of transactional lawyers as “transaction cost engineers” and “reputational intermediaries.” This new model not only helps inform contract theory but also reveals a profoundly different vision than existing models for the future of legal education and the profession.

INTRODUCTION

Everyone understands the value of lawyers as litigators, but for decades scholars have attempted to explain what value lawyers add in their quintessential role as counsel to parties in the negotiating, contract drafting, and opinion giving process³ leading to “closing”⁴ a commercial, financing, or other business transaction (lawyers performing this role being hereinafter referred to as “transactional lawyers” or “transactional

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³ This process may include such incidental roles as helping to structure the transaction and advising the client on its consequences.

⁴ A “closing” is the final stage of a business transaction when the documents and agreements are signed (and, as appropriate, filed with requisite government agencies) and the transaction is then funded or otherwise effectuated.

counsel”⁵).⁶ To date, the efforts of scholars mostly reflect pure theory, occasionally tempered by isolated anecdotes.⁷ As a result, their findings are intrinsically questionable.

The scholarly findings are also both overly broad and incomplete. Professors Gilson, Mnookin, and Gardner argue, for example, that transactional lawyers add value primarily by reducing transaction costs, acting as reputational intermediaries, anticipating and counseling clients about risks and outcomes, identifying differences in valuation between parties, and creating economies of scope.⁸ To a large extent, however—as Professor Gilson himself acknowledges⁹—this represents the same types of value that

⁵ This article focuses on external, as opposed to in-house, transactional lawyers—that is, transactional lawyers within independent law firms. Although law firms continue to dominate sophisticated transactional work (*see* Appendix A, *infra*, at B.3, indicating that most clients seriously consider hiring law firms for transactions that are complex, unusual, or involve large dollar amounts), in-house legal departments in recent years have grown in reputation and skill. The value provided by in-house lawyers as transactional counsel, and the extent to which that value might be different from the value provided by external transactional lawyers, are possible issues for further study. *Cf.* Appendix A, *infra*, at B.1 (showing that transactional lawyers have a somewhat higher opinion than clients of the extent to which a highly reputed law firm contributes to the success of a transaction, perhaps indicating that general counsel with confidence in their own staff do not see as much of a need to hire high reputation firms for transactional work). *See also* Steven L. Schwarcz, “Explaining the Value of *In-House* Transactional Lawyering” (August 21, 2006) (unpublished manuscript, on file with author).

⁶ *Cf.* Ronald Gilson, 2 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 509 (Peter Newman, ed. 1998) (focusing on “lawyers providing non-litigation services to clients engaged in business activities”). Any value that transactional lawyers may provide as litigation counsel is beyond this article’s scope.

⁷ The seminal work is Ronald Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L. J. 239 (1984). *See also* Seminar, *Business Lawyers and Value Creation for Clients*, 74 OR. L. REV. 1 et seq. (1995).

⁸ *See* Gilson, *Value Creation by Business Lawyers*, *supra* note 7, at 242; Peter J. Gardner, *A Role for the Business Attorney in the Twenty-First Century: Adding Value to the Client’s Enterprise in the Knowledge Economy*, 7 MARQ. INTELL. PROP. L. REV. 17, 39 (2003); Ronald J. Gilson & Robert H. Mnookin, *Foreword: Business Lawyers and Value Creation for Clients*, 74 OR. L. REV. 1, 8–10 (1995).

⁹ Gilson, *Value Creation by Business Lawyers*, *supra* note 7, at 295 (“There is nothing traditionally ‘legal’ about the role I have described business lawyers as playing, nor are there any special requirements peculiar to lawyers necessary to play this role.”). *See also* Karl S. Okamoto, *Reputation and the Value of Lawyers*, 74 OR. L. REV. 15, 44–45 (1995) (proposing alternatives to lawyers as reputational intermediaries).

could be added in business transactions by any sophisticated negotiating party, not necessarily one specially trained as a lawyer.¹⁰ Investment bankers, for example, are key players in most business transactions who appear equally capable of identifying differences in valuation between parties, reducing transaction costs, acting as reputational intermediaries, anticipating (at least non-legal) risks and outcomes, and developing economies of scope.¹¹ Unless transactional lawyers add significant value in their capacity as lawyers, their utility would be questionable if not fungible.

This article challenges existing scholarship by attempting, empirically, to discover what value transactional lawyers actually provide. The empirical findings suggest that transactional lawyers create significant value in their capacity as lawyers in ways that have been underestimated by scholars and that may have profound significance to the future of the profession and of legal education.

METHODOLOGY

The article utilizes quantitative data to test a range of hypotheses about how transactional lawyers—focusing on lawyers in external law firms, as opposed to in-house lawyers¹²—might provide value.¹³ These data derive from the results of e-mail surveys with transactional lawyers and their clients.¹⁴ The surveys were conducted using four-page questionnaires, one prepared for lawyers and a slightly modified version prepared for clients. The client questionnaires helped serve as a control, to help reveal any areas where lawyer perceptions of their value might not be shared by clients and thus might be inaccurate.

¹⁰ Though anticipating risks and outcomes is a uniquely lawyerly role to the extent it involves anticipating legal risks and outcomes.

¹¹ See Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 616–21 (1984) (describing the role of the investment banker in distributing securities).

¹² See *supra* note 5.

¹³ This focus on law firms means that the transactions at issue will tend to be those that are complex, unusual, or involve large dollar amounts. See *supra* note 5. See also *infra* note 16 (indicating the practice areas examined).

¹⁴ Cf. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 3 (2002) (observing that empirical data “may be ... the results of interviews or surveys”).

The lawyer questionnaire included twenty-six questions, and the client questionnaire twenty-seven questions, in each case divided into sections based on the hypotheses discussed below.¹⁵ Forms of these questionnaires are annexed as Addenda 1 (Lawyer Questionnaire) and 2 (Client Questionnaire). The lawyer questionnaire was sent to a representative sampling of transactional lawyers,¹⁶ and the client questionnaire was sent to a representative sampling of clients.¹⁷ Approximately eight percent of these lawyers and four percent of these clients responded.¹⁸

¹⁵ See *infra* notes 36-55 and accompanying text.

¹⁶ Lawyer questionnaires were sent to 500 lawyers in New York City, 211 lawyers in Philadelphia, and 270 lawyers in Chicago, cities selected to represent major and regional money centers in the United States. Respondents were selected randomly using a random number generator from a list of lawyers generated from the LexisNexis® Martindale-Hubbell® Lawyer Locator. See Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 107-11 (1994) (using a similar sampling method). To qualify to receive a survey, the lawyer must concentrate the majority of his or her practice in corporate transactional work (including mergers and acquisitions (M&A), securities law, corporate finance, project finance, or structured finance) and be a partner or counsel at a law firm with at least fifty lawyers that is listed in the NALP DIRECTORY OF LEGAL EMPLOYERS.

¹⁷ We initially e-mailed client questionnaires to the general counsel at 165 financial services or Fortune 500 companies. Some additional responses also were obtained by e-mailing client questionnaires to former clients of the author and to Duke Law School alumni working at companies. The relevant text of the e-mail to which all questionnaires were attached is as follows: “[W]e have attached a short (4-page) questionnaire, which should take only a few minutes to complete. We would be grateful for your response or, if you prefer, the response of a colleague (or colleagues) in the legal department. The transactional areas on which we are focusing are securities offerings, M&A, commercial lending, and structured and project finance. / In addition, it would be especially useful to ascertain whether non-lawyers at your company have different perspectives on how law firms add value in business transactions. We therefore would appreciate your sharing the questionnaire with one or more of your non-legal colleagues who work closely with outside counsel in the transactional areas mentioned above, and would be grateful for their responses.”

¹⁸ There were 75 lawyer responses to 981 solicitations, and 17 client responses to 427 solicitations.

The hypotheses tested by these questionnaires are intended to represent all plausible hypotheses for how transactional lawyers might add value.¹⁹ This article does not assume, however, that transactional lawyers in fact add value; it merely asks—if they do, how would that value be supplied?

This begs the questions: what constitutes value, and value to whom? By “value,” this article essentially means monetary value.²⁰ This would include not only lowering direct costs but also indirectly saving costs, such as reducing the time and effort that parties need to devote to a business transaction.²¹ Value also may include less tangible (and thus less quantifiable) factors, such as employing an experienced lawyer to increase client confidence and reduce anxiety.

As to the second question (value to whom?), the most obvious potential recipient of value is the client. For this reason, as well as to serve as a control,²² the article also surveys clients of transactional lawyers. The article takes a broad societal perspective, however, and does not focus on value creation from the standpoint of any single client; even if a clever lawyer is able to negotiate a better deal for her client than a less clever lawyer is able to negotiate for his, that would not increase but would merely reallocate overall value in a zero-sum game.²³

¹⁹ See *infra* notes 23-36 and accompanying text (setting forth these hypotheses and explaining their derivation).

²⁰ Gilson, *Value Creation by Business Lawyers*, *supra* note 7, at 243 (arguing that if a transactional lawyer adds value, the transaction must be worth more, net of legal fees, as a result of the lawyer’s participation). Cf. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 10 (2d ed. 1977) (defining value as “human satisfaction as measured by aggregate consumer willingness to pay for goods and services”).

²¹ Gilson, *Value Creation by Business Lawyers*, *supra* note 7, at 254 (equating “cost-saving” with “value creation”).

²² See *supra* note 14 and accompanying text.

²³ Gilson, *Value Creation by Business Lawyers*, *supra* note 7, at 244-45. This article therefore does not examine the allocative role of transactional lawyers to try to get their clients the greatest slice of the value “pie.”

The foregoing methodology, of course, has potential flaws. Although they constitute “a primary source of data in . . . the social sciences,”²⁴ surveys have inherent limitations, such as being dependent on the precise wording, format, and context of the survey questions.²⁵ Survey data also indicate, in this case, what transactional lawyers and their clients say the former do, which may be different from what transactional lawyers actually do. Transactional lawyers, for example, may view their roles as more important and indispensable than they actually are.²⁶

The low response rates to the questionnaires²⁷ also may signal potential biases, since “nonresponse often is not random.”²⁸ For example, the transactional lawyers who responded may have been more intellectually curious about this project than non-respondents; or those respondents may have been, on average, less busy—and therefore perhaps less competent lawyers—than non-respondents. Without denying the possibility of some such bias, the relatively small deviations in the lawyer-respondents’ answers and the high degree of correlation among city-by-city data mitigate somewhat against the existence of bias.²⁹ Moreover, transactional lawyers tend to be extremely busy, and the

²⁴ Norbert Schwarz, *Self Reports: How the Questions Shape the Answers*, 54 AM. PSYCHOLOGIST 93, 93 (Feb. 1999).

²⁵ *Id.* (observing that surveys are a “fallible source of data [in that] minor changes in question wording, question format, or question context can result in major changes in the obtained results”).

²⁶ See, e.g., Robert E. Rosen, “*We’re All Consultants Now*”: *How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 ARIZ. L. REV. 637, 638 (2002) (“The self-reports of elite actors, like lawyers, are especially suspect, for often they are speeches to an audience (other than the interviewer).”); Robert K. Rasmussen, *Lawyers, Law and Contract Formation*, 98 MICH. L. REV. 2748, 2749-50 (2000) (discussing this tendency from the standpoint of lawyer self-reporting).

²⁷ See text accompanying note 18, *supra*, indicating approximate response rates of eight percent for lawyers and four percent for clients.

²⁸ See generally Shari Seidman Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 229, 245 (2d ed. 2000) (Fed. Jud. Center).

²⁹ The uniformity of these data do not, of course, rule out the possibility that all respondents were similarly biased.

author's expectations going into this project was that response rates would not exceed 10%—remarkably close to the actual response rate.³⁰

Because of these and other potential limitations,³¹ this article attempts to explain and add perspective to the quantitative data by utilizing qualitative data in the form of “evidence about the world [of transactional lawyering] based on observation [and] experience.”³² In part, these data derive from the author's twenty-two years of observations and experiences as a transactional lawyer.³³ The use of qualitative data is as equally “empirical” as the use of quantitative data.³⁴

The results of the survey data are consistent with these observations and experiences, indicating such data do indeed show what transactional lawyers actually do. This is not to say that these results are infallible, merely that—because a “truly empirical approach to measuring the impact of a business lawyer's participation seems

³⁰ Although the client sampling was theoretically biased in that no attempt was made to distinguish clients who use lawyers for transactional work and clients who do not (indeed, all client respondents fell into the first category), any such bias should be minimal since the types of corporate transactional work this article examines (*see supra* note 16) almost always involves lawyers.

³¹ Other potential limitations to this article's methodology include that transactional lawyers were identified through the imprecise practice-area categories in Martindale-Hubbell (*see supra* note 16, listing those categories as M&A, securities law, corporate finance, project finance, and structured finance), and that law firms and clients were matched, based on these listings, using educated guesses.

³² *See* Epstein & King, *The Rules of Inference*, *supra* note 14, at 2 (observing that “empirical research, as natural and social scientists recognize, ... denotes [not only quantitative data but also] evidence about the world based on observation or experience”).

³³ The author represented clients in transactions involving corporate finance, structured finance, and securities law from 1974 through 1989 as an associate and then partner at the law firm of Shearman & Sterling and from 1989 through 1996 as partner and chairman of the Structured Finance Practice Group at the Kaye Scholer law firm.

³⁴ Epstein & King, *The Rules of Inference*, *supra* note 14, at 2 (observing that “neither [quantitative nor qualitative observation about the world] is any more ‘empirical’ than the other”).

impossible”³⁵—survey results may be as close a proxy as feasible to showing what transactional lawyers actually do.

HYPOTHESES

In accordance with the foregoing methodology, this article tests the hypotheses that transactional lawyers add value by 1. minimizing the potential for ex post litigation; 2. reducing transaction costs; 3. reducing regulatory costs³⁶; 4. acting as reputational intermediaries; 5. providing client privilege and confidentiality; 6. creating economies of scope. These hypotheses—representing what appears to be the universe of plausible hypotheses for how transactional lawyers might add value—were compiled from scholarly literature, practitioner literature, transactional lawyer feedback on draft questionnaires, and experience. None of these hypotheses is necessarily mutually exclusive of others. To the extent transactional lawyers add value, they might do so through a combination of these hypotheses.

Each of these hypotheses is further explained below.

1. *The hypothesis that transactional lawyers add value by minimizing the potential for ex post litigation.* This hypothesis predicts that lawyers add value to transactions by anticipating and minimizing the likelihood that failure of the transaction will result in litigation.

2. *The hypothesis that transactional lawyers add value by reducing transaction costs.* Under this hypothesis, transactional lawyers reduce certain transaction costs, thereby increasing the size of the pie for all parties.³⁷ They reduce moral hazard, for example, by drafting transaction documents and agreements to eliminate adverse actions due to changes in incentives. Thus, if the purchase price of a capital asset in an M&A

³⁵ Gilson, *Value Creation by Business Lawyers*, *supra* note 7, at 247-48.

³⁶ In conversations with the author, Professor Victor Fleischer has referred to at least an aspect of this function of lawyers as “regulatory cost engineering.”

³⁷ Gilson, *Value Creation by Business Lawyers*, *supra* note 7, at 246. Professor Gilson refers to lawyers acting in this capacity as “transaction cost engineers.” *Id.* at 253-55.

transaction is adjusted based on buyer's revenues in the year following the sale, the seller's transactional lawyer could negotiate and draft the contract so as to eliminate the buyer's incentive to increase current costs (and thereby adjust the purchase price downward).³⁸ This hypothesis also predicts that transactional lawyers reduce agency costs by implicitly monitoring (as independent advocates for their client's position) that their client's officers act on the client's behalf,³⁹ and effectively reduce asymmetric information by giving legal opinions.⁴⁰

Although complying with law might be broadly viewed as a cost of engaging in a transaction, the relevant literature does not generally include legal compliance as a transaction cost.⁴¹ This article therefore discusses it as a separate hypothesis, below.

3. The hypothesis that transactional lawyers add value by reducing regulatory costs. In its narrow form, this hypothesis predicts that transactional lawyers add value by understanding their clients' regulatory concerns, thereby being able to negotiate deals without compromising regulatory compliance.⁴² This "client-regulatory" legal work involves understanding the law and regulation that bind the client, qua client.

Because most clients, just like most companies, are not highly regulated (if regulated at all),⁴³ this article posits a broader hypothesis, distinguishing between client-regulatory legal work and "transaction-regulatory" legal work. Transaction-regulatory legal work involves understanding the law and regulation that govern the particular type of transaction, irrespective of the regulatory concerns of the client engaging in the

³⁸ *Id.* at 255.

³⁹ *Cf. id.* at 292, 298.

⁴⁰ *Id.* at 275, 291-92 (arguing that, in M&A transactions, transactional lawyers use their position as third-party intermediaries in a repeat-transactional world to give detached opinions on the state of the capital changing hands).

⁴¹ *See infra* notes 74-76 and accompanying text.

⁴² NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW, *supra* note 6 (asserting that transactional lawyers "must play an important role in designing the structure of the transaction in order to assure the desired regulatory treatment").

⁴³ *See infra* note 90 and accompanying text.

transaction. As an example of this distinction, consider a typical legal opinion, concluding (among other things) that an agreement is enforceable according to its terms and that performance thereof would not violate law.⁴⁴ In rendering this opinion, transactional counsel would be performing client-regulatory legal work to the extent counsel's conclusion goes to no violation of law, and would be performing transaction-regulatory legal work to the extent the conclusion goes to enforceability of the agreement qua agreement.

Whereas literature to date examines only client-regulatory legal work, this article also examines transaction-regulatory legal work as a possible source of transactional lawyer value.

4. *The hypothesis that transactional lawyers add value by acting as reputational intermediaries.* Under this hypothesis, transactional lawyers, as repeat players in the transactional world, add value by renting their good reputation to clients. If, for example, a particular law firm is well known for representing underwriters selling securities, the hypothesis predicts that underwriter-clients, by using that firm, signal a measure of reliability and soundness to potential investors in those securities. The high-reputation law firm not only has expertise but, more importantly, bonds itself to good performance; it would lose at least part of its reputation if it fails to perform well. In this regard, reputation appears to be a more effective “bond” than liability because professional negligence is hard to prove⁴⁵ and, where proved, is usually covered by insurance.⁴⁶ The

⁴⁴ Steven L. Schwarcz, *The Limits of Lawyering: Legal Opinions in Structured Finance*, 84 TEX. L. REV. 1, 35-36 & 55-56 (2005). See also *infra* note 78 and accompanying text (discussing legal opinions).

⁴⁵ See, e.g., Krista M. Enns, Note, *Can A California Litigant Prevail in an Action for Legal Malpractice Based on an Attorney's Oral Argument Before the United States Supreme Court?*, 48 DUKE L.J. 111, 146 (1998) (arguing that in legal malpractice actions “causation is so difficult to prove that litigants are likely to fail”); John H. Bauman, *Damages For Legal Malpractice: An Appraisal Of The Crumbling Dike And The Threatening Flood*, 61 TEMP. L. REV. 1127, 1129 (1988).

⁴⁶ Although law firms presumably could make liability more of a “bond” by taking high insurance deductibles and advertising that to potential clients, one does not observe that in practice. Cf. Robert Cenicerros, *Third-party Liability Threat to Lawyers Grows*, BUS.

hypothesis also predicts that hiring a high-reputation law firm adds even greater value when the client does not already have a high reputation (e.g., is not a repeat player) in a type of transaction.

This hypothesis appears to be the most agreed upon scholarly theory of the value added by transactional lawyers.⁴⁷

5. *The hypothesis that transactional lawyers add value by providing client privilege and confidentiality.* According to this hypothesis, lawyers add value by providing clients with a measure of privilege and confidentiality. Clients gain these protections through the attorney-client privilege: a lawyer's work product, including correspondence with clients in preparing for a deal, may be privileged under applicable state law.⁴⁸ Thus, a client may be able to communicate through its lawyers without revealing confidential matters to opposing parties.

6. *The hypothesis that transactional lawyers add value by creating economies of scope.* Economies of scope represent the savings resulting from having the same investment support multiple profitable activities less expensively in combination than separately.⁴⁹ Because transactional lawyers already play a legal role in transactions, this hypothesis predicts that "economies of scope should give them an advantage in performing the [non-legal] aspects of transaction structuring as well."⁵⁰

INS., Nov. 14, 2005 at 16 (observing that law firms disfavor high insurance deductibles and accept such deductibles only where forced to do so by insurance market constraints).

⁴⁷ See e.g., Gardner, *A Role for the Business Attorney in the Twenty-First Century*, *supra* note 8, at 46-48; Okamoto, *Reputation and the Value of Lawyers*, *supra* note 9, at 43.

⁴⁸ See Brian E. Hamilton, *Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege*, 1997 ANN. SURV. AM. L. 629, 633-49 (1997) (giving a state by state look at the corporate attorney-client privilege, and noting the uncertainty of the contours of the privilege in most states).

⁴⁹ CAMPBELL R. HARVEY, HYPERTEXTUAL FINANCE GLOSSARY, *available at* <http://www.duke.edu/~charvey/Courses/wpg/bfglose.htm> (visited Nov. 23, 2005).

⁵⁰ Gilson, *Value Creation by Business Lawyers*, *supra* note 7, at 298.

According to this hypothesis, non-legal jobs include negotiation and drafting of deal documentation, identifying differences in valuation, reducing transaction costs, and engaging in due diligence. This hypothesis predicts, for example, that although a non-lawyer scrivener could instead negotiate and draft deal documentation, a lawyer would still be needed to review the documentation from a legal standpoint. Having the reviewing lawyer also do the negotiation and drafting creates the economy of scope.

In examining this hypothesis, it is important to distinguish economies of scope from economies of scale. The latter represents the savings resulting from the greater efficiency of large-scale processes.⁵¹ Transactional lawyers can and do create economies of scale, such as by counseling multiple transactions of a given type, thereby apportioning the cost of gaining experience and expertise. Although that adds value, it is not value that is unique to transactional lawyering: any party who advises on multiple transactions of a given type could add similar value. For that reason, and since economies of scale are not singled out in the literature as a source of transactional lawyer value, this article does not separately test whether transactional lawyers add value by creating economies of scale. To some extent, however, that value is implicit in certain of this article's other hypotheses. For example, transactional lawyers should better perform transaction-regulatory legal work by counseling multiple transactions, should better perform client-regulatory legal work by counseling multiple clients subject to the same regulatory framework, and should be better reputational intermediaries by engaging in repeat transactions.

More marginal ways in which transactional lawyers may add value. In addition to the foregoing hypotheses, transactional lawyers may add value in more marginal ways. From a behavioral-psychology standpoint, for example, transactional lawyers—by training if not also by the temperament of many who go into the legal profession, especially those who avoid being litigators—are likely to be more risk averse than their

⁵¹ HARVEY, HYPERTEXTUAL FINANCE GLOSSARY, *supra* note 49.

business clients.⁵² These lawyers therefore may provide a sounding board to help clients balance risk-prone ideas. Transactional lawyers also might add value by enhancing the perception of social ordering: society has a fundamental need for order, and lawyers are the priests who provide the order through law, granting confidence and authority to transactions.⁵³ Transactional lawyers additionally can add value to the client by providing a measure of risk-shifting, in that the client might have a claim against the lawyer if the transaction results in losses. Any such claim would succeed, however, only if the lawyer was negligent in failing to protect against the losses, and clients should be able to insure more efficiently in other ways against bad outcomes.⁵⁴ Furthermore, this reallocation in overall value is not the type of value on which this article focuses.⁵⁵

This article tests only the first six hypotheses. It does not systematically attempt to test the more marginal ways in which transactional lawyers might add value.⁵⁶

FINDINGS AND ANALYSIS

Set forth below are this article's empirical findings. The data underlying these findings are presented in detail in Appendix A.⁵⁷ As the analysis shows, these findings contrast starkly in many cases with scholarly theory.

⁵² See, e.g., Susan R. Helper, Symposium, *Governing Alliances: Advancing Knowledge and Controlling Opportunism*, 53 CASE W. RES. L. REV. 929, 931 (2003) (arguing lawyers and economists are both very "risk averse"); Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDIS. L.J. 375, 379 (1997) (predicting "systematic overstatement of risk is a robust, if not universal, phenomenon in the legal profession").

⁵³ For example, the Noachide laws commanded mankind to establish courts of justice and a just social order. See Babylonian Talmud, Baba Bathra 22b, translated in Babylonian Talmud, Baba Bathra 22b (I. Epstein trans. & ed., 1960); see also Rene David, *Two Conceptions of Social Order*, 52 U. CIN. L. REV. 136, 140 (1983).

⁵⁴ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 (2000).

⁵⁵ See *supra* note 23 and accompanying text.

⁵⁶ Thus, although the data in Appendix A hereto, at C.8, indicate that clients do not significantly look to transactional lawyers for third-party objectivity, such data do not systematically probe whether clients use such lawyers as sounding boards to help balance risk-prone ideas.

⁵⁷ Appendix A does not break down the data *as among* the categories of corporate transactional work (M&A, securities law, corporate finance, project finance, and

1. *Findings regarding the hypothesis that transactional lawyers add value by minimizing the potential for ex post litigation.* The findings partly support the first hypothesis, that transactional lawyers add value by minimizing the potential for ex post litigation. Most lawyer-respondents and client-respondents agree that this is one of the primary goals that lawyers drafting contracts should seek to accomplish.⁵⁸ Still, litigation is so rare that this role of lawyers might appear to add relatively modest value. On average, both lawyer-respondents and client-respondents said that only about two percent of contracts actually end up in litigation.⁵⁹

Litigation may be rare, of course, precisely *because* transactional lawyers are effectively minimizing the potential for ex post litigation. Indeed, over three-quarters of the lawyer-respondents and almost two-thirds of the client-respondents felt that contracts drafted by lawyers are much less likely to end up in litigation than contracts drafted by non-lawyers.⁶⁰ That explanation, however, is belied to some extent by the fact that what is litigated is often so different from what anyone negotiating the contract anticipated.⁶¹ Almost half of all lawyer-respondents, and two-thirds of client-respondents, said that none or at most only some⁶² of the issues over which contracts were litigated were anticipated during negotiation.⁶³ Furthermore, none of the lawyer-respondents regarded

structured finance) because the responses as among those categories were not statistically significant. See “Practice Area Data” memorandum from Casey Dwyer to the author (April 20, 2006) (on file with author).

⁵⁸ Appendix A, at A.1.

⁵⁹ See Appendix A, at A.2.

⁶⁰ Appendix A, at A.4.

⁶¹ One could argue, of course, that the fact that what is litigated is often so different from what anyone negotiating the contract anticipated just goes to show that, when lawyers anticipate issues, they are able to avoid litigation (although the reality is that there are always unanticipated issues, and these are mostly the issues that are litigated). Anecdotal evidence suggests this argument would be incomplete, however. See *infra* note 67 and accompanying text (suggesting that money disputes often trigger litigation regardless of the contract terms).

⁶² By “some,” I mean between zero and forty percent.

⁶³ Appendix A, at A.3. These data were unusually “lumpy.” For example, when asked whether contracts are litigated over issues that were anticipated during negotiation, a

“protecting [the] client from future litigation” as the sole primary goal of contracting.⁶⁴ Although most lawyer-respondents saw that protection as an important goal,⁶⁵ the only sole primary goal they identified was creating a roadmap for the parties to follow in their ongoing relationship.⁶⁶

This suggests that the most valuable contracts might be those that straightforwardly describe the basic business understanding. Anecdotal evidence supports this view, suggesting that contracts may have less to do with avoiding litigation per se and more to do about setting forth a basic business understanding, and that money disputes often trigger litigation regardless of the contract terms.⁶⁷ Thus, although avoiding litigation is an important consideration, it may be more of a secondary consideration.⁶⁸

These findings call into question the oft-seen assumption of contract theory that lawyers add value to the contracting process primarily by minimizing the potential for ex

quarter of the lawyer-respondents said that none of those issues were anticipated, approximately a quarter said that 41-60% of those issues were anticipated, while the remaining lawyer-respondents gave answers that appear randomly strewn in the other percentage categories. *Id.* This diverse range may well reflect that individual transactional lawyers see their limited experience as representative, extrapolating from inadequate data. One way to meaningfully interpret these data, however, may be to view them in the aggregate. From that perspective, approximately 43% of contracts on average are litigated over issues that were anticipated during negotiation. *Id.*

⁶⁴ Appendix A, at A.1.

⁶⁵ See *supra* note 58 and accompanying text.

⁶⁶ Appendix A, at A.1 (indicating that 9.3% of lawyer-respondents see this as their sole primary goal when drafting a contract).

⁶⁷ Comments of Stanley Star, Principal of Star Management Inc., to the author’s class, Principles of Commercial & Bankruptcy Law (Nov. 4, 2005).

⁶⁸ Although 11.8% of the client-respondents did see protection from future litigation as the sole primary goal that lawyers drafting contracts should seek to accomplish (*see* Appendix A, at A.1), that disparity from the lawyer-survey findings may reflect that clients hire lawyers for result oriented reasons, whereas lawyers view their role as more process oriented—in this case, to set forth a roadmap for the parties to follow in order to achieve, among other things, protection of the client from future litigation.

post litigation.⁶⁹ That in turn calls into question, at least in a business law context, contract-theory scholarship that is based on that assumption. In its place, the findings suggest the possibility of a modified paradigm for business law contracting: primarily to provide a roadmap for the parties to follow in their ongoing relationship, and secondarily to minimize the potential for ex post litigation. To some extent these goals are related, in that a clear roadmap minimizes the potential for litigation. Additionally, however, a clear roadmap not only documents the basic business understanding but also minimizes the potential for ex post disputes that do not rise to the level of litigation.

Minimizing the potential for ex post litigation, and arguably also the potential for non-litigated disputes, so far has been viewed as a discrete hypothesis. Conceptually, however, it is more logically viewed (and in the remainder of this article will be discussed) as a subset of the next two hypotheses: reducing transaction costs and reducing regulatory costs. It is a subset of the former to the extent transactional lawyers help avoid business issues—and a subset of the latter to the extent transactional lawyers help avoid legal issues—that result in litigation and other disputes.

2. Findings regarding the hypothesis that transactional lawyers add value by reducing transaction costs. The findings weakly support the second hypothesis, that transactional lawyers add value by reducing transaction costs (namely by reducing moral hazard by drafting transaction documents and agreements to eliminate adverse actions due to a change in incentives; by reducing agency costs by implicitly monitoring, as independent advocates for their client's position, that their client's officers act on the client's behalf; and by effectively reducing asymmetric information by giving legal opinions⁷⁰).

⁶⁹ See, e.g., Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L. J. 814 (2006) (assuming this as the primary goal of contracting). See also Jeffrey M. Lipshaw, *Contingency and Contracts: A Philosophy of Complex Business Transactions*, 54 DEPAUL L. REV. 1077 (2005) (generally addressing the lawyer's role in contracts to minimize and prepare for future contingencies, including the potential for litigation).

⁷⁰ See *supra* notes 37-40 and accompanying text.

Although most lawyers and clients felt that transactional counsel should be somewhat responsible for anticipating, and drafting to protect the client against, possible future events that could change the client's business incentives,⁷¹ far fewer thought such counsel should be responsible for anticipating or drafting to protect the client against possible future events that could change the business incentives of other transaction parties.⁷² Furthermore, relatively few lawyers and far fewer clients felt that transactional counsel monitor the client's officers to any significant extent.⁷³

Perhaps it is not surprising that transactional lawyers in fact add relatively little value in these ways. There is nothing per se "legal" about the role of transactional lawyers in reducing moral hazard; sophisticated non-lawyer scriveners also could anticipate moral hazard and draft to avoid it, such as by negotiating and drafting an M&A contract to eliminate a buyer's incentive to increase current costs and thereby adjust a deferred purchase price downward.⁷⁴ Nor is there anything per se legal about the role of transactional lawyers in agency cost monitoring, a job that independent non-lawyers could likewise perform.⁷⁵ Indeed, Professor Gilson himself has recognized that non-lawyers could—and to some extent probably do—perform these functions as well as and at lower cost than lawyers.⁷⁶

⁷¹ Appendix A, at E.2.

⁷² Appendix A, at E.3.

⁷³ Appendix A, at E.4 (showing that only a third of lawyer-respondents monitor to a significant or greater extent that their client's officers act on the client's behalf, and that less than a fifth of client-respondents (6.3% ÷ 33.3%) perceive even that limited monitoring).

⁷⁴ See *supra* notes 37-38 and accompanying text (using this example of moral hazard).

⁷⁵ See *supra* note 73 and accompanying text (showing that transactional lawyers do not perform this monitoring to any significant extent).

⁷⁶ Gilson, *Value Creation by Business Lawyers*, *supra* note 7, at 254 n. 39, 298-299, & 300-01. *But cf. infra* notes 114-125 and accompanying text (discussing whether transactional lawyers could reduce these costs more efficiently than non-lawyers due to economies of scope).

The only example in the scholarly literature of transactional lawyers using their legal skills to reduce transaction costs is through giving legal opinions to reduce asymmetric information between transaction parties.⁷⁷ Legal opinions are

informed judgments, usually in writing, given by lawyers on issues of law. Although legal opinions are sometimes directed to clients, *in a transactional setting legal opinions are often provided, at the request of clients, to or for the benefit of third parties* such as financiers of credit or investors. . . . Third parties commonly require these opinions as a condition precedent to closing business transactions. *The opinions provide some assurance that, at least insofar as those parties have requested opinion coverage . . . , nothing legally problematic lurks beneath the transaction's surface.* Lawyers providing the opinion apply applicable law to the transaction's particular facts in order to reach their legal conclusions. . . . [T]he inability of counsel to deliver a requested opinion at closing signals a problem and allows intended opinion recipients to refuse to consummate the transaction.⁷⁸

The survey findings suggest, however, that opinion-giving by transactional lawyers is relatively insignificant. Only a small fraction—five to fifteen percent—of a transactional lawyer's work is involved with issuing legal opinions.⁷⁹ Moreover, opinion-giving fits uneasily into the second hypothesis. The argument for its fit is that it reduces transaction costs by reducing information asymmetry.⁸⁰ But it can be misleading to say that legal opinions reduce information asymmetry since “recipients of [legal] opinions often have the same factual information that opining counsel has.”⁸¹ Legal opinions actually work in a more limited sense—by applying applicable law to those facts in order to reach legal conclusions⁸²—and even then the “[r]ecipient's counsel is likely to have the same ability to apply the law to facts as opining counsel.”⁸³

⁷⁷ Gilson, *Value Creation by Business Lawyers*, *supra* note 7, at 312.

⁷⁸ *The Limits of Lawyering*, *supra* note 44, at 9-14 (emphasis added).

⁷⁹ Appendix A, at E.1.

⁸⁰ *See supra* note 77.

⁸¹ *The Limits of Lawyering*, *supra* note 44, at 10 n.54.

⁸² *Id.* at 10-11.

⁸³ Jonathan Macey, *The Limits of Legal Analysis: Using Externalities to Explain Legal Opinions in Structured Finance*, 84 TEX. L. REV. 75, 77 (2005).

Opinion-giving does, however, fit more naturally into the next hypothesis, that transactional lawyers add value by reducing regulatory costs—by assessing the legal consequences of the transaction for the parties receiving the opinion.⁸⁴

3. *Findings regarding the hypothesis that transactional lawyers add value by reducing regulatory costs.* The findings strongly support the third hypothesis, that transactional lawyers add value by reducing regulatory costs.⁸⁵ Over ninety-three percent of transactional lawyers said their transactional work involves law to a “significant” or “great” extent.⁸⁶ Although that percentage may to some extent reflect a self-reporting bias,⁸⁷ the equivalent figure for client respondents was almost as high.⁸⁸ These findings differ significantly from the predictions of existing theoretical literature.

To appreciate how transactional lawyers add value under this hypothesis, this article distinguishes between client-regulatory legal work and transaction-regulatory legal work.⁸⁹ Although transactional counsel can add value by performing client-regulatory legal work, there are two important limitations on that value. The first is that many companies that engage in transactions—and therefore many clients of transactional lawyers—are not regulated entities.⁹⁰ The legal work performed by those transactional lawyers would not be client-regulatory.

⁸⁴ *The Limits of Lawyering*, *supra* note 44, at 11 n. 54.

⁸⁵ See Appendix A, at F.1 (indicating that the work of transactional lawyers involves law to a significant extent).

⁸⁶ *Id.*

⁸⁷ See *supra* note 26 and accompanying text. See also Rasmussen, *supra* note 26, at 2749-50 (observing that “law is the province of lawyers, and thus, lawyers will be more likely to perceive an important role for law in any given transaction than would nonlawyers”).

⁸⁸ Appendix A, at F.1 (showing that 76.5% percent of clients said their lawyer’s transactional work involves law to a “significant” or “great” extent).

⁸⁹ See *supra* note 42 and following text.

⁹⁰ Although 59% of the client-respondents reported that their business was significantly more highly regulated than “ordinary” business corporations (see Appendix A, at F.2), that relatively high indication of regulation may reflect only that more heavily regulated companies responded disproportionately to the survey.

The second limitation is that, even where their clients are regulated entities, transactional lawyers do not always need to get deeply involved with the regulation. Even when regulation is central to a transaction, the findings show that transactional lawyers do not always feel a need to understand their clients' regulatory concerns in detail.⁹¹ The majority of transactional lawyers understand those concerns only to the extent needed to know when to alert regulatory counsel—typically in-house counsel of the client⁹²—to the possibility of legal issues.⁹³

Experience confirms this second limitation. Transactional lawyers representing a bank, for example, need only become sufficiently familiar with the federal margin regulations⁹⁴ to know when to alert regulatory counsel that there may be a compliance issue.⁹⁵ Transactional counsel also are not “typically requested [to opine] on issues whose analysis would be independent of the transaction’s fact pattern.”⁹⁶ This interplay of transactional and regulatory counsel may well have evolved because the complexities of

⁹¹ Only about a third of the lawyer-respondents felt the need to understand their clients' regulatory concerns in detail. Appendix A, at F.3. Although almost half of the client-respondents felt that their transactional lawyers did need such a detailed understanding, that apparent discrepancy simply may reflect that 58.8% of the client survey data were from businesses—whereas only 28.7% of the lawyer-respondent data related to clients—that said they were “significantly” or “greatly” more highly regulated than “ordinary” business corporations. *See* Appendix A, at F.2. Breaking down the data shows a strong correlation between the degree of client regulation and the extent to which clients want their lawyers to understand their regulatory concerns in more detail.

⁹² *The Limits of Lawyering*, *supra* note 44, at 51 (observing that many in-house legal staffs have attorneys specifically dedicated to compliance with law). *See also id.* at 35-36 (observing that in-house counsel typically give no-violation-of-law opinions). Regulatory counsel also can be colleagues of the transactional lawyers or lawyers at other firms.

⁹³ Appendix A, at F.3.

⁹⁴ Regulation U, 12 C.F.R. § 221 (restricting certain bank loans used to purchase or refinance the purchase of margin stock).

⁹⁵ Such a compliance issue would arise, for example, where the bank makes a loan secured by margin stock, especially where that loan is used to purchase or refinance the purchase of margin stock. Noncompliance with Regulation U would render the loan void. *Stonehill v. Sec. Nat'l Bank*, 68 F.R.D. 24 (S.D.N.Y. 1975).

⁹⁶ *The Limits of Lawyering*, *supra* note 44, at 11 n. 53. For an efficiency explanation of which transactional counsel is better situated to provide legal opinions, *see* Macey, *The Limits of Legal Analysis*, *supra* note 83, at 76-78.

modern regulation can make it impractical for a lawyer to gain and maintain expertise in both regulation of a client and regulation of transactions engaged in by the client.

Consistent with those limitations, the findings suggest that transactional counsel reduce regulatory costs, and thus add value, primarily by performing transaction-regulatory legal work: by providing expertise in the law and regulations that generally govern the transaction and by understanding the rationale for the contractual provisions in the transaction documents.⁹⁷ This expertise can include, for example, ensuring that desired legal priorities are achieved, and that security interests are properly perfected and subordination agreements are enforceable; that indenture covenants are not violated, and that covenant protections adequately balance debtor and creditor needs; that commercial-law remedies to made available upon insolvency or default work in harmony with debtor-creditor law protections; that legal entities are established in the form (e.g., corporation, trust, partnership, limited liability company) and with the governance characteristics most effective for the task, given such competing constraints as the tradeoff between equity-holder and creditor rights, bankruptcy law, tax law, and accounting; that guaranties and other credit supports are legally enforceable; that any special-purpose entities achieve the applicable legal requirements of rating agencies and investors, such as “true sale,” “non-consolidation,” and other “bankruptcy remoteness” criteria; that cross-border legal demands are complied with; and that any securities law requirements are met.⁹⁸ These findings conflict with scholarly conclusions that transactional lawyers primarily add the same types of value that could be added in business transactions by any sophisticated negotiating party, not necessarily one specially trained as a lawyer.⁹⁹

4. *Findings regarding the hypothesis that transactional lawyers add value by acting as reputational intermediaries.* The findings weakly support the fourth hypothesis, that transactional lawyers add value by acting as reputational intermediaries. One of the main claims of this hypothesis—that much greater trust should be given to

⁹⁷ Appendix A, at F.4.

⁹⁸ These examples also reflect the author’s experience.

⁹⁹ See *supra* notes 9-10 and accompanying text.

non-legal information where the party giving that information (e.g., a company being acquired in an M&A transaction) is represented by a reputable law firm¹⁰⁰—was almost unanimously rejected by transactional lawyers and clients alike.¹⁰¹ This rejection is particularly significant because this hypothesis, that transactional lawyers add value by acting as reputational intermediaries, is the most agreed upon scholarly theory.¹⁰²

To some extent, these findings should not be surprising. Aside from the incongruity of lawyers—who, after all, do not have the highest public trust—acting as proxies for trustworthiness, the value of a law firm as a reputational intermediary would be expected to be proportional to the *need* for trustworthiness and credibility. In simple or

¹⁰⁰ See, e.g., Gilson, *Value Creation by Business Lawyers*, *supra* note 7, at 288-93 (describing the central role of transactional lawyers as reputational intermediaries paid to verify the seller-client’s information for the buyer). This article’s survey did not specifically test a weaker form of this claim, that transactional lawyers add value as reputational intermediaries in certain securities offerings by delivering a limited “negative assurance” legal opinion as to absence of knowledge of potential securities-law disclosure violations under SEC Rule 10b-5. See Gilson, *Value Creation by Business Lawyers*, *supra* note 7, at 291-93 (using the perspective of transactional-lawyer-as-reputational-intermediary to help explain the existence of these opinions). I have no doubt these opinions add some value, but they effectively address legal conclusions and therefore fall within this article’s discussion of legal opinions generally. See *supra* notes 77-84, 44 and accompanying text. In any event, these opinions are appropriate in only very narrow circumstances. Special Report of the Task Force on Securities Law Opinions of the ABA Section of Business Law, *Negative Assurances in Securities Offerings*, 59 BUS. LAW. 1513 (2004).

¹⁰¹ Appendix A, at B.5 (68.0% of lawyer-respondents and 82.4% of client-respondents said that non-legal information should not be trusted any more simply because the party giving that information is represented by a reputable law firm). Only 30.7% of lawyers and 17.7% of clients felt that information should be trusted even “somewhat” more, and only one respondent (a lawyer) felt that information should be trusted “much” more). *Id.*

¹⁰² See *supra* note 47 and accompanying text. *But cf.* Okamoto, *Reputation and the Value of Lawyers*, *supra* note 9, at 42-43 (suggesting that the lawyer’s role as reputational intermediary is declining over time). Perhaps that decline is at least partly due to the increasing limited liability partnership (LLP) organization of law firms. *Cf.* Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1727-28 (1998) (positing that “unlimited liability, by substituting for reputational and financial capital, arguably provides an important assurance to clients that law firms will discipline shirking and other self-interested conduct by their members.”).

routine transactions, that need may be small, whereas the cost of hiring a high-reputation law firm may be expensive.

Furthermore, even in complex or unusual transactions involving large amounts of money, the need for trustworthiness and credibility often concerns financial, not legal, information. To this end, accountants, and not lawyers, are held responsible for certifying the accuracy of that information.¹⁰³

The findings additionally reveal other limitations to the reputational intermediary hypothesis. Contrary to theory, reputational value per se is less important than the quality and experience provided by high reputation transactional counsel, who add value primarily by performing better legal work. Thus, one-hundred percent of client-respondents and almost ninety-nine percent of lawyer-respondents cited experience as the most important reason that law firms contribute to the success of a transaction.¹⁰⁴ Reputation value by itself was a secondary consideration, along with the law firm having smart lawyers.¹⁰⁵ One lawyer's comment typifies the responses: "Skill not reputation is the key. Most lawyers don't care about 'firm name,' but can quickly assess competence."¹⁰⁶

¹⁰³ Steven L. Schwarcz, *Financial Information Failure and Lawyer Responsibility*, 31 J. CORP. L. issue no. 4 (forthcoming Sept 2006) (examining the boundary between lawyer and accountant responsibility for financial information). Even negative assurance legal opinions (discussed *supra* note 100) commonly exclude legal conclusions based on financial information. E-mail from William Widen, Associate Professor, University of Miami School of Law, & former Partner, Cravath, Swaine & Moore, to the author (July 21, 2005) (observing that "it was quite common, in [his] experience, for lawyers to exclude financial statement information from the scope of the negative assurance given to underwriters in a 10b-5 [negative assurance opinion] letter").

¹⁰⁴ Appendix A, at B.2.

¹⁰⁵ *Id.*

¹⁰⁶ Cf. Timothy Hia, Note, *Que Sera, Sera? The Future of Specialization in Large Law Firms*, 2002 COLUM. BUS. L. REV. 541, 560 (2002) (observing that training and specialization of lawyers within law firms is increasingly important to enhancement of reputational value in specific practice areas). To this extent, reputational value may be self-enhancing, in that high-reputation firms are more likely to train their lawyers well in order to enhance the quality of their work and thus preserve the reputation.

Reputation also can create costs that offset value. For example, to the extent a party to a transaction hires a high-reputation law firm, another party may feel “outgunned” and thus hire its own high-reputation law firm, resulting in a “dollar auction” arms race. These costs could be substantial; approximately forty-three percent of client respondents said they would consider hiring a highly-reputed law firm simply because the opposing party did so.¹⁰⁷

5. *Findings regarding the hypothesis that transactional lawyers add value by providing client privilege and confidentiality.* The findings are mixed regarding the fifth hypothesis, that transactional lawyers add value by providing client privilege and confidentiality. While forty-four percent of client-respondents said the attorney-client privilege provided significant value and twenty-five percent even said it provided great value,¹⁰⁸ most respondents said that this privilege did not significantly facilitate transactions or, if it did facilitate transactions, that it did so only to a small degree.¹⁰⁹

These results can perhaps be explained by the perspective of respondents to the questionnaire: from the standpoint of any given client, this privilege can be valuable. It is less clear, however, that the privilege creates net overall value, which this article views from a broad societal perspective (and not from the standpoint of any single client).¹¹⁰

Even if this hypothesis accounted for a portion of transactional lawyer value, that portion may well fluctuate over time. Privileges and confidentiality are somewhat artificial,¹¹¹ and there appears to be a trend, at least in the corporate context, to narrow the

¹⁰⁷ Appendix A, at B.3.

¹⁰⁸ Appendix A, at D.1.

¹⁰⁹ Appendix A, at D.2.

¹¹⁰ *Cf.* text accompanying note 23, *supra* (viewing “value” from a broad societal perspective, not from the standpoint of any single client).

¹¹¹ The attorney-client privilege first developed under Roman law, but was not well-entrenched in modern law until the reign of Queen Elizabeth I, when it was viewed as a means of protecting an attorney’s honor as a gentleman. Ken M. Zeidner, Note, *Inadvertent Disclosure and the Attorney-Client Privilege: Looking to the Work-Product Doctrine for Guidance*, 22 CARDOZO L. REV. 1315, 1320 (2001).

attorney-client privilege.¹¹² States also could, if they wished, create similar privileges for non-lawyer advisers.¹¹³ This article therefore does not attach much significance to this fifth hypothesis.

6. *Findings regarding the hypothesis that transactional lawyers add value by creating economies of scope.* The findings only weakly support the sixth hypothesis, that transactional lawyers add value through economies of scope. Recall that this hypothesis predicts that transactional lawyers can more efficiently perform non-legal transactional work, such as negotiating and drafting deal documentation,¹¹⁴ because they already are involved in performing the legal work. A majority of both lawyer and client respondents indeed agreed that, at least to some extent, transactional lawyers perform non-legal work because someone must do so and transactional lawyers are already involved.¹¹⁵ Almost half of the lawyer-respondents also felt that such non-legal work is, to a significant extent, necessarily incident to their legal tasks.¹¹⁶ In contrast, though, most client-respondents felt that non-legal work performed by transactional lawyers is only to some extent if at all necessarily incident to those lawyers' legal tasks.¹¹⁷

More problematically for the economy-of-scope hypothesis, the findings call into question its hallmark—that transactional lawyers can *more efficiently* perform the non-legal transactional work. Almost two-thirds of client-respondents indicated that the non-

¹¹² See, e.g., Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157, 159 (1993) (arguing that traditional rationales for the attorney-client privilege do not hold in the corporate context, and that the corporate attorney-client privilege should be abolished). See also Thomas Ross, *Knowing No Other Duty: Privity, The Myth of Elitism, and the Transformation of the Legal Profession*, 32 WAKE FOREST L. REV. 819, 827 (1997) (observing the extent to which state legislatures are narrowing the attorney-client privilege).

¹¹³ Similar privileges already exist, for example, for communications between individuals and physicians, clergymen, and therapists. Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 32 (1998).

¹¹⁴ See *supra* note 50 and following text.

¹¹⁵ Appendix A, at C.3.

¹¹⁶ Appendix A, at C.4.

¹¹⁷ *Id.*

legal work performed by transactional lawyers could be performed more efficiently by non-lawyers.¹¹⁸ The findings also show that transactional lawyers usually charge at their full rate when performing non-legal work,¹¹⁹ so clients pay dearly for it.¹²⁰

It therefore behooves lawyers, for their integrity if not also to attempt to achieve a true economy of scope (and, more self-interestedly, to preserve this franchise¹²¹), to perform this work as efficiently as feasible. To this end, law schools should consider emphasizing writing and contract-drafting and negotiating skills, which business schools (at least regarding writing and drafting) do not presently emphasize.¹²²

This recognizes that economies of scope exist only where the same investment supports multiple profitable activities less expensively in combination than separately.¹²³ Utilizing transactional lawyers to negotiate and draft contracts merely because they already are involved in examining regulatory aspects of the transaction does not ensure that each additional activity will be performed profitably, or as profitably as such activity would be performed by other parties. The negotiating and contracting process itself can create, or destroy, value—the former being exemplified by the creation of personal relationships that help build business relationships between opposing parties and the consensus problem-solving that helps facilitate closing the business transaction to all

¹¹⁸ Appendix A, at C.6. To some extent, this view may reflect the rate charged by transactional lawyers, next discussed, when performing non-legal work.

¹¹⁹ Appendix A, at C.5 (84.6% of client-respondents said that their transactional lawyers charged full rates for non-legal work).

¹²⁰ *Cf. Financial Information Failure and Lawyer Responsibility*, *supra* note 103 (showing in another context that economy of scope alone would not justify extending lawyer responsibility to non-legal matters—namely, that lawyers advising a public firm should not be charged with responsibility as independent gatekeepers vis-à-vis the firm's accountants because, even where such lawyers are already involved in advising the firm (and thus would achieve an economy of scope by acting as accounting gatekeepers), the cost of imposing this additional responsibility would exceed its benefits).

¹²¹ Although the findings do not reveal the precise size of this franchise, more than two-thirds of client-respondents believe that the work of transactional lawyers can be performed at least to some extent by a non-lawyer. Appendix A, at C.1.

¹²² See Leslie L. Cooney & Lynn A. Epstein, *Classroom Associates: Creating a Skills Incubation Process for Tomorrow's Lawyer*, 29 CAP. U. L. REV. 361, 364-372 (2001).

¹²³ See *supra* note 49 and accompanying text (defining economies of scope).

parties' satisfaction.¹²⁴ Where transactional lawyers do not facilitate those interpersonal and problem-solving goals, they may well destroy the value that an economy of scope could achieve—the ultimate manifestation of which is a lawyer who, by obstinacy or otherwise, causes a valuable transaction to fail.¹²⁵ This suggests that law schools additionally should consider stressing consensus problem-solving and the importance of interpersonal relationships.

CONCLUSIONS

This article's findings show that transactional lawyers add value, or at least say that they add value, primarily by reducing regulatory costs. Of the two types of regulatory costs—client-regulatory and transaction-regulatory¹²⁶—transactional lawyers normally focus on the latter. This may help explain why they usually concentrate in such transaction-regulatory intensive areas as securities law, M&A, bank lending, structured finance, and project finance.¹²⁷

These findings present a very different picture of how business lawyers add value than that portrayed by existing scholarship, thereby challenging the reigning models of

¹²⁴ One client-questionnaire respondent, for example, observed that an important goal of contracting is to “help build our business relationship with the other party.” Survey Response on file with author. *See also The World: China—“One Billion Customers”* (PBS, WUNC FM, radio broadcast Nov. 21, 2005) (interview by Lisa Mullins with James McGregor, author of *ONE BILLION CUSTOMERS—LESSONS FROM THE FRONT LINES DOING BUSINESS IN CHINA* and former China bureau chief, *WALL STREET JOURNAL*): “In China, you negotiate a contract but that piece of paper in the ends means nothing. But the process of negotiating and the personal relationships you build while negotiating that contract and the problem solving methods you work out together in doing that, those are the things that are going to make the business go ahead and hold on.” This observation appears true in the U.S. as well.

¹²⁵ In this regard, it is noteworthy that whereas most lawyer-respondents felt they actively try to facilitate good relationships with opposing counsel, clients did not always share that perception. Appendix A, at C.7.

¹²⁶ For an explanation of the differences between these costs, *see supra* notes 43 & 84-44 and accompanying text.

¹²⁷ Indeed, unregulated companies that engage in routine unregulated transactions often do not hire outside transactional counsel, and sometimes might not use counsel at all. Schwarcz, *supra* note 5, at ____.

transactional lawyers as “transaction cost engineers” and “reputational intermediaries.” Under those models, transactional lawyer value “rests neither on [the] inherently legal character [of transactional lawyer work] nor ... on skills acquired through traditional legal training.”¹²⁸ As a result, scholars have predicted a bleak possible vision of the future, in which “the [legal] profession’s transactional role is reduced from engineer to draftsman, at the expense of lawyers’ prosperity and the intellectual interest of their work”¹²⁹ due to competition with other professions, such as investment bankers and accountants.¹³⁰

That vision, however, appears flawed. If transactional lawyers provide most of their value through their expertise in law, they are unlikely to face competition with, much less to be replaced by, non-legal professionals. Indeed, fewer than two percent of lawyer-respondents and fewer than twelve percent of client-respondents felt that transactional lawyer work could be performed by non-lawyers to any significant extent.¹³¹ To the extent law and regulation become more pervasive in the future, transactional lawyers will become even more uniquely valuable. Contrary to academic claims, transactional lawyers are (and should be) secure in their professions.

This article’s findings also suggest flaws in the existing scholarly visions of how legal education should change. Based on existing models, scholars have argued for an increased focus on finance theory and transaction-cost economics.¹³² Some even claim that teaching these economic subjects in lieu of the case method will help law students to

¹²⁸ Gilson, *Value Creation by Business Lawyers*, *supra* note 7, at 301 (commenting in the context of the transaction cost engineer model).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Appendix A, at C.1. Although “some” work performed by transactional lawyers might be performed more efficiently by non-lawyers (*compare* Appendix A, at C.1, *with* Appendix A, at C.6), most such work could not because transactional lawyers add most of their value by reducing regulatory costs.

¹³² *See, e.g.,* Gilson, *Value Creation by Business Lawyers*, *supra* note 7, at 304-05; Gilson & Mnookin, *supra* note 8, at 3-14.

develop judgment.¹³³ Although, as a professor of law and business, I regard finance theory and transaction-cost economics as important, the findings suggest that budding transactional lawyers would be even better served by focusing on law and on applying legal concepts to solve real-world problems—goals that the case method has a long and distinguished record of helping students to achieve.¹³⁴ Similarly, law schools should introduce, if not emphasize, the importance of developing good working relationships between opposing lawyers in business transactions.¹³⁵ Perhaps Dean Kronman has been right, after all, in emphasizing the importance of traditional case analysis over theory and social sciences.¹³⁶

¹³³ See Gilson & Mnookin, *supra* note 8, at 6-7 (arguing that teaching such disciplines as “[t]ransaction cost economics” and “the economics of information” will more effectively “send out from law school more students with judgment than just those who arrived already possessing it.”).

¹³⁴ This does not imply that finance and economic theory should be ignored; the question is one of balance. Cf. Roberta Romano, *After the Revolution in Corporate Law*, 55 J. LEG. ED. 342, 351 (2005) (arguing that “[m]odern finance [has] become the language of business, and lawyers need[] to be knowledgeable about it in order to serve their clients”). See also *id.* at 352 (discussing the “need for technical proficiency” in finance and economics on the part of business lawyers).

¹³⁵ Business schools already emphasize the importance of developing good working relationships between parties. See, e.g., Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, or [sic] Human Relationships in the Practice of Law*, 58 U. MIAMI L. REV. 1225, 1277-78 (2004) (observing that “[a]lthough courses in relationship skills may seem odd to those familiar with law schools, similar courses, and numerous varieties of courses that teach teamwork, have been staples at some of the country’s best Business Schools for decades”); Martin E. P. Seligman, Paul R. Verkuil, Terry H. Kang, *Why Lawyers are Unhappy*, 23 CARDOZO L. REV. 33, 51 (2001) (observing that “law school pedagogy differs from that of business schools, where cooperative projects and thinking are the rule in leading MBA programs”).

¹³⁶ Cf. ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 225-64 (1993) (maintaining this emphasis) with Gilson & Mnookin, *supra* note 8, at 7 (arguing that teaching the disciplines referred to *supra* note 133 “will do a far better job [of training transactional lawyers] than the case method purveyors of Dean Kronman’s golden age could ever have imagined”).

This article does not claim, however, that its findings are dispositive of these issues. As discussed, its use of survey methodology has inherent limitations.¹³⁷ The article nonetheless is a first empirical step in engaging the debate over these issues.

¹³⁷ See *supra* notes 24-31 and accompanying text.

Addendum 1: Form of Lawyer Questionnaire**LAWYER QUESTIONNAIRE**

Name:

Firm:

Position with Firm:

Location:

Area(s) of Practice:

Years of Legal Experience:

NOTICE: This questionnaire's purpose is to help understand the value added by outside counsel in the negotiating and contracting process leading to closing a commercial, financial, or other business transaction. Please assume that all questions below pertain to those types of transactions.

A. Minimizing Potential for Ex Post Litigation

1. When drafting a contract, what are you primarily trying to accomplish?: (a) __ setting forth a roadmap for the parties to follow in their ongoing relationship; (b) __ protecting your client from future litigation; (c) __ both of the above; (d) __ other (please specify below).

-
-
2. Approximately what percentage of contracts that you draft eventually end up in litigation (please specify percentage)?: ____%
 3. Approximately what percentage of those litigated contracts are litigated over issues that were anticipated during negotiation?: ____%
 4. To what extent, if any, are lawyer-drafted contracts less likely to result in future litigation than contracts drafted without using lawyers?: (a) __ much less likely; (b) __ somewhat less likely; (c) __ not less likely; (d) __ uncertain.

B. Acting as Reputational Intermediaries

1. To what extent, if any, does a highly reputed law firm contribute to the success of a transaction?: (a) __ to a great extent; (b) __ to a significant extent; (c) __ to some extent; (d) __ to a small extent or not at all.
2. If a highly reputed law firm contributes to the success of a transaction, why might it do so (check all that apply)?: (a) __ such law firm is experienced in the type of transaction; (b) __ such law firm has smart lawyers; (c) __ hiring such law firm signals trustworthiness and credibility to other transaction parties; (d) __ hiring such law firm signals trustworthiness and credibility to potential investors.
3. Clients should seriously consider hiring a highly reputed law firm (check all that apply): (a) __ in all complex or unusual transactions; (b) __ in all transactions involving large dollar amounts; (c) __ in all transactions where the transaction parties put a premium on trustworthiness and credibility; (d) __ in all transactions where potential investors put a premium on trustworthiness and credibility; (e) __ in all transactions

where opposing parties hire highly reputed law firms.

4. Assuming no conflicts of interest, highly reputed law firms (check all that apply): (a) ___ are as willing to be hired for unusual transactions as for more typical transactions; (b) ___ are sometimes reluctant to be hired for unusual transactions; (c) ___ may be biased against innovating changes in transactions; (d) ___ are not biased against innovating changes in the transactions.

5. To what extent, if any, should parties to a transaction trust ***non-legal*** information provided by another transaction party if that party is represented by a reputable law firm, as opposed to where that party is represented only by in-house counsel?: (a) ___ should trust that information much more; (b) ___ should trust that information somewhat more; (c) ___ should have no greater trust in that information.

C. Creating Economies of Scope

1. To what extent could your work on a transaction be performed by a non-lawyer?: (a) ___ to a great extent; (b) ___ to a significant extent; (c) ___ to some extent; (d) ___ to a small extent or not at all.

2. Please briefly describe any non-legal work that falls under this category:

3. To what extent do you perform that non-legal work simply because someone must, and you already are involved in the transaction?: (a) ___ to a great extent; (b) ___ to a significant extent; (c) ___ to some extent; (d) ___ to a small extent or not at all.

4. To what extent is that non-legal work necessarily incident to your legal tasks?: (a) ___

to a great extent; (b) ___ to a significant extent; (c) ___ to some extent; (d) ___ to a small extent or not at all.

5. Do you charge at the same rate for that non-legal work?: ___ Yes; ___ No.

6. Could that non-legal work be performed more efficiently by non-lawyers?: ___ Yes; ___ No.

7. When negotiating a transaction, to what extent do you actively try to facilitate good relationships with opposing counsel?: (a) ___ to a great extent; (b) ___ to a significant extent; (c) ___ to some extent; (d) ___ to a small extent or not at all.

D. Creating Client Privilege and Confidentiality

1. To what extent do you protect your client by creating an attorney-client privilege?: (a) ___ to a great extent; (b) ___ to a significant extent; (c) ___ to some extent; (d) ___ to a small extent or not at all.

2. To what extent does the attorney-client privilege help facilitate transactions?: (a) ___ to a great extent; (b) ___ to a significant extent; (c) ___ to some extent; (d) ___ to a small extent or not at all; (e) ___ the attorney-client privilege works against facilitating transactions (for example, by increasing information asymmetry among transaction parties).

E. Reducing Transaction Costs

1. What percentage of your work on a transaction involves preparing, issuing, and/or reviewing legal opinions?: ____ %.

2. To what extent are you responsible for anticipating, and drafting to protect your client against, possible future events that could change your client's business incentives?: (a) ___ to a great extent; (b) ___ to a significant extent; (c) ___ to some extent; (d) ___ to a small extent or not at all.

3. To what extent are you responsible for anticipating, and drafting to protect your client against, possible future events that could change the business incentives of *other transaction parties*?: (a) ___ to a great extent; (b) ___ to a significant extent; (c) ___ to some extent; (d) ___ to a small extent or not at all.

4. To what extent do you monitor that your client's officers act on the client's behalf?: (a) ___ to a great extent; (b) ___ to a significant extent; (c) ___ to some extent; (d) ___ to a small extent or not at all.

F. Reducing Regulatory Costs

1. To what extent does your work on a transaction actually involve law?: (a) ___ to a great extent; (b) ___ to a significant extent; (c) ___ to a small extent.

2. To what extent are your non-bank transactional clients more regulated by government than an ordinary business corporation?: (a) ___ to a great extent; (b) ___ to a significant extent; (c) ___ to a small extent; (d) ___ not at all.

3. When you represent a bank or other regulated entity in a business transaction, to what extent do you need to understand the details of that client's particular regulatory concerns?: (a) ___ in detail; (b) ___ only sufficiently to know when to alert regulatory counsel to the possibility of legal issues; (c) ___ other [please describe: _____].

4. When you represent an ordinary business corporation in a business transaction, which of the following statements are true (mark all that are true)?: (a) ☐ you need to provide expertise in the law and regulations that generally govern that type of transaction; (b) ☐ you need to understand the rationale for the contractual provisions in the transaction documents; (c) ☐ other [please describe: _____]
_____]

Addendum 2: Form of Client Questionnaire**CLIENT QUESTIONNAIRE**

Name:

Company:

Position with Company:

Location:

Area(s) of Responsibility:

Years of Experience:

NOTICE: This questionnaire's purpose is to help understand the value added by outside counsel in the negotiating and contracting process leading to closing a commercial, financial, or other business transaction. Please assume that all questions below pertain to those types of transactions.

A. Minimizing Potential for Ex Post Litigation

1. When you hire lawyers to draft a contract, what do you want them to primarily accomplish?: (a) ___ to set forth a roadmap for the parties to follow in their ongoing relationship; (b) ___ to protect your company from future litigation; (c)___ both of the above; (d) ___ other (please specify below).

2. Approximately what percentage of your contracts eventually end up in litigation (please specify percentage)?: ____%

3. Approximately what percentage of those litigated contracts are litigated over issues that were anticipated during negotiation?: ____%

4. To what extent, if any, are lawyer-drafted contracts less likely to result in future litigation than contracts drafted without using lawyers?: (a) __ much less likely; (b) __ somewhat less likely; (c) __ not less likely; (d) __ uncertain.

B. Acting as Reputational Intermediaries

1. To what extent, if any, does hiring a highly reputed law firm contribute to the success of a transaction?: (a) __ to a great extent; (b) __ to a significant extent; (c) __ to some extent; (d) __ to a small extent or not at all.

2. If hiring a highly reputed law firm contributes to the success of a transaction, why might it do so (check all that apply)?: (a) __ such law firm is experienced in the type of transaction; (b) __ such law firm has smart lawyers; (c) __ hiring such law firm signals trustworthiness and credibility to other transaction parties; (d) __ hiring such law firm signals trustworthiness and credibility to potential investors.

3. One should seriously consider hiring a highly reputed law firm (check all that apply): (a) __ in all complex or unusual transactions; (b) __ in all transactions involving large dollar amounts; (c) __ in all transactions where the transaction parties put a premium on

trustworthiness and credibility; (d) ___ in all transactions where potential investors put a premium on trustworthiness and credibility; (e) ___ in all transactions where opposing parties hire highly reputed law firms.

4. Assuming no conflicts of interest, highly reputed law firms (check all that apply): (a) ___ are as willing to be hired for unusual transactions as for more typical transactions; (b) ___ are sometimes reluctant to be hired for unusual transactions; (c) ___ may be biased against innovating changes in transactions; (d) ___ are not biased against innovating changes in the transactions.

5. To what extent, if any, do you trust ***non-legal*** information provided by another transaction party if that party is represented by a reputable law firm, as opposed to where that party is represented only by in-house counsel?: (a) ___ trust that information much more; (b) ___ trust that information somewhat more; (c) ___ no greater trust in that information.

C. Creating Economies of Scope

1. To what extent could your lawyer's work on a transaction be performed by a non-lawyer?: (a) ___ to a great extent; (b) ___ to a significant extent; (c) ___ to some extent; (d) ___ to a small extent or not at all.

2. Please briefly describe any non-legal work that falls under this category:

3. To what extent does your lawyer perform that non-legal work simply because someone must, and your lawyer already is involved in the transaction?: (a) ___ to a great extent; (b) ___ to a significant extent; (c) ___ to some extent; (d) ___ to a small extent or not at all.

4. To what extent is that non-legal work necessarily incident to your lawyer's legal tasks?: (a) ___ to a great extent; (b) ___ to a significant extent; (c) ___ to some extent; (d) ___ to a small extent or not at all.
5. Does your lawyer charge at the same rate for that non-legal work?: ___ Yes; ___ No.
6. Could that non-legal work be performed more efficiently by non-lawyers?: ___ Yes; ___ No.
7. To what extent does involving your lawyer in that non-legal work add value by providing third-party objectivity?: (a) ___ to a great extent; (b) ___ to a significant extent; (c) ___ to some extent; (d) ___ to a small extent or not at all.
8. To what extent do you want your lawyer, when negotiating a transaction, to facilitate good relationships with opposing counsel?: (a) ___ to a great extent; (b) ___ to a significant extent; (c) ___ to some extent; (d) ___ to a small extent or not at all.

D. Creating Client Privilege and Confidentiality

1. To what extent do you value the protection provided by the attorney-client privilege?: (a) ___ to a great extent; (b) ___ to a significant extent; (c) ___ to some extent; (d) ___ to a small extent or not at all.
2. To what extent does the attorney-client privilege help facilitate transactions?: (a) ___ to a great extent; (b) ___ to a significant extent; (c) ___ to some extent; (d) ___ to a small extent or not at all; (e) ___ the attorney-client privilege works against facilitating transactions (for example, by increasing information asymmetry among transaction parties).

E. Reducing Transaction Costs

1. What percentage of your lawyer's work on a transaction involves preparing and issuing legal opinions?: ____ %.

2. To what extent is your lawyer responsible for anticipating, and drafting to protect you against, possible future events that could change your business incentives?: (a) ____ to a great extent; (b) ____ to a significant extent; (c) ____ to some extent; (d) ____ to a small extent or not at all.

3. To what extent is your lawyer responsible for anticipating, and drafting to protect you against, possible future events that could change the business incentives of *other transaction parties*?: (a) ____ to a great extent; (b) ____ to a significant extent; (c) ____ to some extent; (d) ____ to a small extent or not at all.

4. To what extent does your lawyer monitor that your company's officers act on the company's behalf?: (a) ____ to a great extent; (b) ____ to a significant extent; (c) ____ to some extent; (d) ____ to a small extent or not at all.

F. Reducing Regulatory Costs

1. To what extent does your lawyer's work on a transaction actually involve law?: (a) ____ to a great extent; (b) ____ to a significant extent; (c) ____ to a small extent.

2. To what extent is your company more regulated by government than an ordinary business corporation?: (a) ____ to a great extent; (b) ____ to a significant extent; (c) ____ to a small extent; (d) ____ not at all.

3. When you hire outside lawyers to work on a business transaction, to what extent should they need to understand the details of your company's particular regulatory concerns?: (a) ___ in detail; (b) ___ only sufficiently to know when to alert your company's regulatory counsel to the possibility of legal issues.
4. When you hire outside lawyers to work on a business transaction, which of the following statements are true (mark all that are true)?: (a) ___ they should provide expertise in the law and regulations that generally govern that type of transaction; (b) ___ they should understand the rationale for the contractual provisions in the transaction documents.

APPENDIX A: DETAILED PRESENTATION OF THE DATA UNDERLYING THIS ARTICLE'S FINDINGS

A. Minimizing Potential for Ex Post Litigation

1. When drafting a contract, what are you primarily trying to accomplish?:

	Lawyers				Clients¹³⁸ (n=17)
	Overall (n=75)	New York (n=28)	Philadelphia (n=27)	Chicago (n=20)	
(a) Setting forth a roadmap for the parties to follow in their ongoing relationship	9.3 %	3.6 %	3.7 %	25.0%	0.0 %
(b) protecting your client from future litigation	0.0 %	0.0 %	0.0 %	0.0%	11.8 %
(c) both of the above	84.0 %	89.3 %	92.6 %	65.0 %	88.2 %
(d) other	32.0 %	35.7 %	37.0 %	20.0 %	11.8 %

2. Approximately what percentage of contracts that you draft eventually end up in litigation (please specify percentage)?: ____%

	Lawyers				Clients (n=17)
	Overall (n=74)	New York (n=27)	Philadelphia (n=27)	Chicago (n=20)	
Average	2.06 %	1.65 %	2.26 %	2.33 %	1.24 %
Median	1.0 %	1.0 %	1.0 %	1.0 %	1.0 %

¹³⁸ The wording of the client question and possible answers varied slightly. See Addendum 2 (Form of Client Questionnaire).

Standard Deviation	3.33	2.64	3.16	4.37	2.36
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3. Approximately what percentage of those litigated contracts are litigated over issues that were anticipated during negotiation?:

	Lawyers				Clients (n=12)
	Overall (n=55) ¹³⁹	New York (n=19)	Philadelphia (n=17)	Chicago (n=19)	
0	25.5 %	31.6%	23.5 %	21.1 %	50.0%
1-20	10.9 %	0.0 %	11.8%	21.1 %	16.7%
21-40	7.3 %	5.3 %	11.8 %	5.3 %	0.0%
41-60	27.3 %	36.8 %	17.6 %	26.3 %	33.3%
61-80	9.1 %	10.5 %	11.8 %	10.5 %	0.0%
81-99	3.6 %	0.0 %	11.8 %	0.0 %	0.0%
100	16.4 %	15.8 %	17.6 %	15.8 %	0.0%
Average	43.71 %	43.95 %	47.41 %	40.16 %	17.17 %
Median	50 %	50 %	50 %	50 %	0.50 %
Standard Deviation	36.92	36.31	40.01	36.36	24.30

4. To what extent, if any, are lawyer-drafted contracts less likely to result in future litigation than contracts drafted without using lawyers?:

¹³⁹ The low response rate to this question stems from the fact that most who answered zero to Question A.2 found this question non-applicable.

	Lawyers				Clients (n=14)
	Overall (n=72)	New York (n=26)	Philadelphia (n=26)	Chicago (n=20)	
(a) Much less likely	80.6 %	84.6 %	76.9 %	80.0 %	64.3 %
(b) Somewhat less likely	9.7 %	3.9 %	11.5 %	15.0 %	28.6 %
(c) Not less likely	0.0 %	0.0 %	0.0 %	0.0 %	0.0 %
(d) Uncertain	11.1 %	11.5 %	15.4 %	5.0 %	7.1%

B. Acting as Reputational Intermediaries

1. To what extent, if any, does a highly reputed law firm contribute to the success of a transaction?:

	Lawyers				Clients (n=16)
	Overall (n=74)	New York (n=28)	Philadelphia (n=27)	Chicago (n=19)	
(a) To a great extent	47.3 %	46.4 %	51.9 %	42.1 %	25.0 %
(b) To a significant extent	41.9 %	42.9 %	33.3 %	52.6 %	37.5 %
(c) To some extent	10.8 %	10.7 %	14.8 %	5.3 %	18.8 %
(d) To a small extent or not at all	1.4 %	0.0 %	0.0 %	5.3 %	18.8 %

2. If a highly reputed law firm contributes to the success of a transaction, why might it do so (check all that apply)?:

	Lawyers				Clients (n=14)
	Overall (n=75)	New York (n=28)	Philadelphia (n=27)	Chicago (n=20)	
(a) Such law firm is experienced in the type of transaction	98.7 %	100.0 %	96.3 %	100.0 %	100.0%
(b) Such law firm has smart lawyers	73.3 %	75.0 %	66.7 %	80.0 %	57.1 %
(c) Hiring such law firm signals trustworthiness and credibility to other transaction parties	81.3 %	82.1 %	85.2 %	75.0 %	71.4 %
(d) Hiring such law firm signals trustworthiness and credibility to potential investors	74.7 %	75.0 %	77.8 %	70.0 %	42.9 %

3. Clients should seriously consider hiring a highly reputed law firm (check all that apply):

	Lawyers				Clients (n=14)
	Overall (n=74)	New York (n=28)	Philadelphia (n=26)	Chicago (n=20)	
(a) In all complex or unusual transactions	98.6 %	100.0 %	96.2 %	100.0 %	85.7 %
(b) In all transactions involving large dollar	68.9 %	71.4 %	76.9 %	55.0 %	64.3 %

amounts					
(c) In all transactions where the transaction parties put a premium on trustworthiness and credibility	62.2 %	64.3 %	80.8 %	35.0 %	42.9 %
(d) In all transactions where potential investors put a premium on trustworthiness and credibility	62.2 %	60.7 %	76.9 %	45.0 %	57.1 %
(e) In all transactions where opposing parties hire highly reputed law firms	44.6 %	53.6 %	42.3 %	35.0 %	42.9 %

4. Assuming no conflicts of interest, highly reputed law firms (check all that apply):

	Lawyers				Clients (n=16)
	Overall (n=72)	New York (n=26)	Philadelphia (n=27)	Chicago (n= 19)	
(a) Are as willing to be hired for unusual transactions as for more typical transactions	90.3 %	92.3 %	88.9 %	89.5 %	100.0 %
(b) Are sometimes reluctant to be hired for unusual transactions	8.3 %	7.7 %	11.1 %	5.3 %	0.0 %
(c) May be biased against innovating changes in transactions	9.7 %	3.9 %	14.8 %	10.5 %	12.5 %
(d) Are not biased against	83.3 %	96.2 %	74.1 %	78.9 %	68.9 %

innovating changes in the transactions					
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5. To what extent, if any, should parties to a transaction trust *non-legal* information provided by another transaction party if that party is represented by a reputable law firm, as opposed to where that party is represented only by in-house counsel?:

	Lawyers				Clients (n=17)
	Overall (n=75)	New York (n=28)	Philadelphia (n=27)	Chicago (n=20)	
(a) Should trust that information much more	1.3 %	3.6 %	0.0 %	0.0 %	0.0 %
(b) Should trust that information somewhat more	30.7 %	25.0 %	29.6 %	40.0 %	17.7 %
(c) Should have no greater trust in that information	68.0 %	71.4%	70.4 %	60.0 %	82.4 %

C. Creating Economies of Scope

1. To what extent could your work on a transaction be performed by a non-lawyer?:

	Lawyers				Clients (n=17)
	Overall (n=74)	New York (n=28)	Philadelphia (n=26)	Chicago (n=20)	
(a) To a great extent	0.0 %	0.0 %	0.0 %	0.0 %	5.9 %
(b) To a significant extent	1.4 %	3.6 %	0.0 %	0.0 %	5.9 %

(c) To some extent	45.9 %	39.3 %	50.0 %	50.0 %	58.8 %
(d) To a small extent or not at all	52.7 %	57.1 %	50.0 %	50.0 %	29.4 %

2. Please briefly describe any non-legal work that falls under this category:

3. To what extent do you perform that non-legal work simply because someone must, and you already are involved in the transaction?:

	Lawyers				Clients (n=15)
	Overall (n=75)	New York (n=28)	Philadelphia (n=27)	Chicago (n=20)	
(a) To a great extent	8.0 %	3.6 %	11.1 %	10.0 %	13.3 %
(b) To a significant extent	22.7 %	28.6 %	14.8 %	25.0 %	13.3 %
(c) To some extent	28.0 %	21.4 %	25.9 %	40.0 %	33.3 %
(d) To a small extent or not at all	41.3 %	46.4 %	48.1 %	25.0 %	40.0 %

4. To what extent is that non-legal work necessarily incident to your legal tasks?:

	Lawyers				Clients (n=14)
	Overall (n=75)	New York (n=28)	Philadelphia (n=27)	Chicago (n=20)	
(a) To a great extent	24.0 %	32.1 %	22.2 %	15.0 %	0.0 %
(b) To a significant extent	24.0 %	17.9 %	25.9 %	30.0 %	21.4 %
(c) To some extent	33.3 %	32.1 %	29.6 %	40.0 %	50.0 %

(d) To a small extent or not at all	18.7 %	17.9 %	22.2 %	15.0 %	28.6 %
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5. Do you charge at the same rate for that non-legal work?:

	Lawyers				Clients (n=14)
	Overall (n=71)	New York (n=26)	Philadelphia (n=25)	Chicago (n=20)	
Yes	90.1 %	96.2 %	84.0%	90.0 %	84.6 %
No	9.9 %	3.9 %	16.0%	10.0 %	15.4 %

6. Could that non-legal work be performed more efficiently by non-lawyers?:

	Lawyers				Clients (n=17)
	Overall (n=75)	New York (n=28)	Philadelphia (n=27)	Chicago (n=20)	
Yes	41.3 %	39.3 %	37.0 %	50.0 %	64.7 %
No	42.7 %	42.9 %	37.0 %	50.0 %	17.6 %
Not Answered	16.0 %	17.9 %	26.0 %	0.0 %	17.6 %

7. When negotiating a transaction, to what extent do you actively try to facilitate good relationships with opposing counsel?:

	Lawyers				Clients (n=16)
	Overall (n=75)	New York (n=28)	Philadelphia (n=27)	Chicago (n=20)	
(a) To a great extent	66.7 %	67.9 %	66.7 %	65.0 %	37.5 %
(b) To a significant extent	28.0 %	28.6 %	22.2 %	35.0 %	31.3 %
(c) To some extent	5.3 %	3.6 %	11.1 %	0.0 %	31.3 %
(d) To a small extent or not at all	0.0 %	0.0 %	0.0 %	0.0 %	0.0 %

8. (Question for clients only) To what extent does involving your lawyer in that non-legal work add value by providing third-party objectivity?

	Clients (n=14)
(a) To a great extent	0.0 %
(b) To a significant extent	0.0 %
(c) To some extent	35.7 %
(d) To a small extent or not at all	64.3 %

D. Creating Client Privilege and Confidentiality

1. To what extent do you protect your client by creating an attorney-client privilege?:

	Lawyers				Clients (n=16)
	Overall (n=75)	New York (n=28)	Philadelphia (n=27)	Chicago (n=20)	
(a) To a great extent	42.7 %	46.4 %	63.0 %	10.0 %	25.0 %
(b) To a significant extent	24.0 %	17.9 %	11.1 %	50.0 %	43.8 %
(c) To some extent	29.3 %	25.0 %	25.9 %	40.0 %	31.3 %
(d) To a small extent or not at all	4.0 %	10.7 %	0.0 %	0.0 %	0.0 %

2. To what extent does the attorney-client privilege help facilitate transactions?:

	Lawyers				Clients (n=16)
	Overall (n=75)	New York (n=28)	Philadelphia (n=27)	Chicago (n=20)	
(a) To a great extent	12.0 %	7.1 %	25.9 %	0.0 %	12.5 %
(b) To a significant extent	13.3 %	14.3 %	18.5 %	5.0 %	12.5 %
(c) To some extent	34.7 %	28.6 %	29.6 %	50.0 %	37.5 %
(d) To a small extent or not at all	40.0 %	50.0 %	25.9 %	45.0 %	37.5 %
(e) The attorney-client privilege works against facilitating transactions (for example, by increasing information asymmetry among transaction parties)	1.3 %	3.6 %	0.0 %	0.0 %	0.0 %

E. Reducing Transaction Costs

1. What percentage of your work on a transaction involves preparing, issuing, and/or reviewing legal opinions?:

	Lawyers				Clients (n= 16)
	Overall (n=75)	New York (n=28)	Philadelphia (n=27)	Chicago (n=20)	
Average	6.47 %	6.10 %	7.56 %	5.53 %	14.6 %
Median	5 %	5 %	5 %	5 %	10.0 %
Standard Deviation	4.80	4.14	6.23	3.08	13.3

2. To what extent are you responsible for anticipating, and drafting to protect your client against, possible future events that could change your client's business incentives?:

	Lawyers				Clients (n=17)
	Overall (n=74)	New York (n=27)	Philadelphia (n=27)	Chicago (n=20)	
(a) To a great extent	50.0 %	48.2%	51.9 %	50.0 %	41.2 %
(b) To a significant extent	28.4 %	33.3 %	25.9 %	25.0 %	35.3 %
(c) To some extent	20.3 %	14.8 %	22.2 %	25.0 %	17.7 %
(d) To a small extent or not at all	1.4 %	3.7 %	0.0 %	0.0 %	5.9 %

3. To what extent are you responsible for anticipating, and drafting to protect your client against, possible future events that could change the business incentives of *other transaction parties*?:

	Lawyers				Clients (n=17)
	Overall (n=72)	New York (n=26)	Philadelphia (n=26)	Chicago (n=20)	
(a) To a great extent	25.0 %	26.9 %	34.6 %	10.0 %	29.4 %
(b) To a significant extent	25.0 %	26.9 %	19.2%	30.0 %	11.8 %
(c) To some extent	33.3 %	34.6 %	30.8 %	35.0 %	35.3 %
(d) To a small extent or not at all	16.7 %	11.5 %	15.4 %	25.0 %	23.5 %

4. To what extent do you monitor that your client's officers act on the client's behalf?:

	Lawyers				Clients (n=16)
	Overall (n=75)	New York (n=28)	Philadelphia (n=27)	Chicago (n= 20)	
(a) To a great extent	9.3 %	14.3 %	3.7 %	10.0 %	0.0 %
(b) To a significant extent	24.0 %	21.4 %	25.9 %	25.0 %	6.3 %
(c) To some extent	36.0 %	32.1 %	40.7 %	35.0 %	31.3 %
(d) To a small extent or not at all	30.7 %	32.1 %	29.6 %	30.0 %	62.5 %

F. Reducing Regulatory Costs

1. To what extent does your work on a transaction actually involve law?:

	Lawyers				Clients (n=17)
	Overall (n=74)	New York (n=28)	Philadelphia (n=26)	Chicago (n=20)	
(a) To a great extent	23.0 %	21.4 %	19.2 %	30.0 %	17.7 %
(b) To a significant extent	70.3 %	75.0 %	65.4 %	70.0 %	58.8 %
(c) To a small extent	6.8 %	3.6 %	15.4 %	0.0 %	23.5 %

2. To what extent are your non-bank transactional clients more regulated by government than an ordinary business corporation?

	Lawyers				Clients (n=17)
	Overall (n=73)	New York (n=26)	Philadelphia (n=27)	Chicago (n=20)	
(a) To a great extent	8.2%	11.5 %	11.0 %	0.0 %	29.4 %
(b) To a significant extent	20.5 %	26.9 %	18.5 %	15.0 %	29.4 %
(c) To a small extent	54.8 %	53.9 %	55.6 %	55.0 %	23.5 %
(d) Not at all	16.4 %	7.7 %	14.8 %	30.0 %	17.7 %

3. When you represent a bank or other regulated entity in a business transaction, to what extent do you need to understand the details of that client's particular regulatory concerns?:

	Lawyers				Clients (n=17)
	Overall (n=71)	New York (n=27)	Philadelphia (n=26)	Chicago (n=18)	
(a) In detail	32.4 %	33.3 %	42.3 %	16.7 %	47.1 %
(b) Only sufficiently to know when to alert regulatory counsel to the possibility of legal issues	56.3 %	63.0 %	34.6 %	77.8 %	52.9 %
(c) Other	9.9 %	3.7 %	19.2 %	5.6 %	n/a

4. When you represent an ordinary business corporation in a business transaction, which of the following statements are true (mark all that are true)?:

	Lawyers				Clients (n=17)
	Overall (n=74)	New York (n=27)	Philadelphia (n=27)	Chicago (n=20)	
(a) You need to provide expertise in the law and regulations that generally govern that type of transaction	93.2 %	88.9 %	92.6 %	100.0 %	94.1 %
(b) You need to understand the rationale for the contractual provisions in the transaction documents	97.3 %	100.0 %	96.3 %	95.0 %	88.2 %
(c) Other	29.7 %	22.2 %	33.3 %	35.0 %	n/a